Supreme Court, U.S.
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No. 09-568

IN THE
Supreme Court of the United States

MAREMONT CORPORATION,
Petitioner,

v.

FLORENCE DIANE ST. JOHN, Individually and as Administratrix ad Prosequendum of the Estate of Harold St. John,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Below, the Third Circuit Court of Appeals granted a motion to remand based upon a procedural defect in Petitioner's Notice of Removal. Should this Court order review on a writ of certiorari to address the fact-specific waiver question posed by Petitioner, which was never ruled upon by the Court of Appeals?

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INTRODUCTION

Maremont Corporation's (Maremont or Petitioner) petition is premised on a misapprehension of the Third Circuit Court of Appeals' ruling. That court granted Respondent Florence St. John's motion for a remand based upon a procedural defect in Maremont's Notice of Removal. The Notice was defective because Maremont failed to attach summonses and orders as required by 28 U.S.C. §1446(a). In opposing the motion, Maremont did not dispute the procedural defect in its removal, nor did it seek to cure the deficiencies. Rather, it argued that remand was not mandatory and that the court had the discretion to permit a cure. In a one-sentence decision, the court granted the motion before it and remanded the case. Thus, the court never ruled upon the issue presented in Maremont's petition.

Moreover, even as set forth in the petition, Maremont's question does not warrant review because there is no conflict among the circuit courts, and because there is no issue of federal importance to resolve.

The petition should be denied.

STATEMENT OF THE CASE

This mesothelioma death case came on for trial in the Superior Court of New Jersey, Middlesex County vicinage, on May 26, 2009. Shortly before the trial began, counsel to Plaintiff reported to Defendants that Mrs. St. John had settled her claims with Honeywell

Corp., which was the only remaining non-diverse defendant. As a result, the matter became removable under 28 U.S.C. § 1441.

Rather than inform the trial court of their intention to remove, or seek leave to stay the trial, Defendants remained silent, and jury selection began. Defendants introduced themselves to the jury; they identified potential witnesses for the jury; and they participated in jury selection. In particular, Maremont exercised two of its allotted three peremptory challenges and dismissed other jurors for cause. The other Defendants also participated in jury selection and, collectively, they discharged nearly one dozen potential jurors. Plaintiff, in contrast, retained the overwhelming majority of her challenges.

Apparently dissatisfied with the emerging jury panel and the depleted supply of peremptory challenges, Maremont elected to remove this matter to the United States District Court for the District of New Jersey. At around 3:00 P.M. that afternoon, Maremont, joined by all other Defendants, filed a Notice of Removal with the district court.

After the Notice was filed, Mrs. St. John filed an Order to Show Cause seeking a remand to the state court on grounds of waiver. Following argument, the district court made a fact-specific decision, concluding that Maremont's participation in jury selection resulted in a waiver of its right to remove.

Maremont appealed to the Third Circuit Court of

Appeals and filed a motion to stay the remand in the District Court. The District Court granted the motion to stay, while reiterating the correctness of its decision to remand.

After the thirty-day statutory removal period expired, Mrs. St. John filed, in the Court of Appeals, a motion to remand on the ground that the Notice of Removal did not include the summonses and orders entered below, as required by 28 U.S.C. 1446(a). Mrs. St. John argued that remand was now required because the defect in the Notice could no longer be cured.[1] In

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[1] Following Congress' adoption of the "1988 Judicial Improvements Access to Justice Act," Pub. L. No. 100-702, courts have held that a procedurally defective Notice of Removal may not be cured after the expiration of the thirty-day removal period if a plaintiff has filed a timely motion to remand. *See, e.g., Andalysia Enters., Inc. v. Evanston Ins. Co.*, 487 F. Supp. 2d 1290 (M.D. Ala. 2007) (requirement in 28 U.S.C.A. § 1446(a) that removing party "shall file . . . process" is mandatory and incurable after 30 days); *Kisor v. Collins*, 338 F. Supp. 2d 1279, 1281 (N.D.Ala. 2004)("This court, sitting as a court of limited jurisdiction, cannot ignore a manifest procedural defect that a plaintiff has expressly complained about just because the defect was inadvertent or because the removing defendant tenders a belated correction."); *Macri v. M & M Contractors, Inc.*, 897 F. Supp. 381 (N.D. Ind.1995) (case remanded when defects of an unsigned removal petition, lack of prompt written notice to plaintiff, and failure to promptly file a copy of the notice with the state court were not cured within 30-day removal period); *Kinateder v. Am. Family Mut. Ins. Co. of Wis.*, 2009 WL 539668 (D. Colo. Mar. 4, 2009) (remand based on failure to file a state-court order); *Durand v. The Hartford Life and Acc. Ins. Co.*, 2007 WL 1395336 (D. Colo. 2007) (case remanded where defendant fails to include summons with Notice of Removal); *Employer Shopmens Local 516 Pension Trust v. Travelers Cas. And Sur. Co. Of*

the alternative, she argued that appellate jurisdiction was lacking because the district court's remand order was not appealable under 28 U.S.C. § 1447.

In response, Maremont maintained that, unlike the mandatory nature of remand if a defect in removal is jurisdictional, a remand based on a procedural defect is left to the court's discretion. In reply, Mrs. St. John pointed out that, even if the court had the authority to excuse the deficiency, Maremont had failed to offer any reason for it to do so. Moreover, she continued, because Maremont had participated in state-court jury selection without informing the court or counsel of its decision to remove, there was no warrant to exercise discretion for Maremont's benefit.

In a single sentence, the Third Circuit Court of Appeals granted the motion to remand:

> *The foregoing* Motion by Appellee Florence Diane St. John to Remand Case to the Superior Court of the State of New Jersey, or in the alternative, to Dismiss Case for Lack of Jurisdiction is hereby GRANTED to the extent that, for essentially the reasons provided by the District Court, this matter is REMANDED to the Superior Court of New Jersey, Middlesex County, for further proceedings.

America, 2005 WL 1653629 at 4 (D. Or. July 6, 2005). Maremont's petition does not challenge this case law.

Pet. App. 1a.

Thus, the Third Circuit granted the motion to remand due to Maremont's defective Notice of Removal. Contrary to Maremont's assertion in the Petition, the court did not "affirm" the District Court's holding that Maremont waived its right to remove; the propriety of that holding had not yet been briefed by the parties or presented to the appellate court.

REASONS FOR DENYING THE WRIT

I. MAREMONT'S QUESTION PRESENTED WAS NOT PRESENTED TO OR RULED UPON BY THE THIRD CIRCUIT.

Mrs. St. John made two arguments in the Court of Appeals. The primary relief sought in the motion on which the court ruled was a remand to state court based upon an incurable procedural defect in Maremont's Notice of Removal. In the alternative, she sought dismissal of Maremont's appeal on the ground that appellate jurisdiction was lacking because the District Court's waiver-based remand decision was not appealable under 28 U.S.C. § 1447.[2] The Third Circuit Court of Appeals ruled on the first argument and ordered the case remanded.[3]

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[2] Specifically, Mrs. St. John maintained that, because the district court held that Maremont had waived its right to remove, Maremont's removal was defective for a reason "other than lack of subject matter jurisdiction" under the purview of 28 U.S.C. § 1447(c) and, therefore, was not reviewable under 28 U.S.C. § 1447(d). *See, e.g., Carlsbad Tech. Inc. v. HIF Bio, Inc.*, __ U.S. __, 129 S. Ct. 1862 (2009); *Kircher v. Putnam Funds Trust*, 547 U.S. 633, 640 (2006)("[W]e have relentlessly repeated that any remand order issued on the grounds specified in § 1447(c) is immunized from all forms of appellate review, whether or not that order might be deemed erroneous by an appellate court.")(internal brackets and quotations omitted); *See also Schmitt v. Ins. Co. of N. Am.*, 845 F. 2d 1546 (9th Cir. 1988) (finding a remand based on waiver within 28 U.S.C. § 1447(c)).

[3] The court did not, as the Petitioner suggests, "reject" the Plaintiff's alternative argument to dismiss the appeal (*see* Pet.

Again, the only basis for the motion to remand was the procedural defect in the Notice of Removal. By referring to "the reasons provided by the District Court," the order appeared to agree with Maremont that it had discretion to allow Maremont to cure the defect. But the court declined to exercise that discretion and remanded on the basis of the procedural defect, in light of the reasons stated by the District Court.

The Third Circuit did not decide the waiver issue set forth in Maremont's Question Presented. The issue was not even briefed on the motion. Because Maremont seeks review of a remand order based upon an issue that was not presented to the appellate court, the petition should be denied.

II. THE COURT LACKS JURISDICTION TO REVIEW A REMAND BASED UPON A PROCEDURAL DEFECT IN THE NOTICE OF REMOVAL

With few exceptions, an order remanding a case to the state court from which it was removed is not reviewable on appeal. 28 U.S.C. § 1447(d).[4] And as this

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6 at n.2); it simply did not reach it, as even a cursory review of the very brief order makes plain. *See* Pet. App. 1a.

[4] Section 1447(d) states, in pertinent part: "An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal

Court has stated, section 1447(d) "preclude[s] review" of remands "for defects in removal procedure." *Powertex Corp. v. Reliant Energy Services, Inc.*, 551 U.S. 224, 229 (2007).

Because the Third Circuit granted Respondent's motion to remand for "defects in removal procedure," this Court lacks jurisdiction to review the order below, and, for this additional reason, the Petition should be denied.

III. EVEN AS FRAMED BY MAREMONT, THE QUESTION PRESENTED DOES NOT WARRANT REVIEW

With regard to the waiver issue itself, and contrary to Petitioner's assertion, the circuit courts have not adopted differing standards to evaluate when a waiver has occurred. Rather, the relevant distinction is between those cases that address the consequences of a waiver claimed to have occurred prior to trial, and those that address the consequences of a waiver claimed to have occurred during trial. Courts are uniform in their treatment: They are less willing to find that a waiver has occurred before a trial commences than thereafter.

Moreover, even if --as Maremont claims—the Third Circuit had adopted the District Court's ruling, that ruling was based on the appropriate legal standard. The District Court found a clear and

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or otherwise."

unequivocal waiver, and remanded on that basis. Maremont's disagreement with the District Court's application of the facts to the agreed-upon standard does not merit review. In addition, given the unusual facts of this case, the District Court's decision will have no widespread implications.

A. The Court of Appeals' Order Does Not Create a Conflict Among The Circuits.

Maremont claims that the Third Circuit's order conflicts with decisions of other courts of appeals on the issue whether a defendant must manifest a "clear and unequivocal" intent to waive its right to remove before this right is lost. In fact, like other circuits, the Third Circuit follows the "clear and unequivocal" standard when a litigation-based waiver of the right to remove is asserted. The conflict described by Maremont simply does not exist.

1. Third Circuit case law clearly embraces the same standard advocated by Maremont. Indeed, Maremont acknowledges as much in its Petition, citing to *Foster v. Chesapeake Ins. Co.*, 933 F.2d 1207 (3d Cir. 1991). Pet. 9 at n.4). In *Foster*, the Third Circuit agreed that a litigation-based waiver of the right to remove must be clear and unequivocal. *Id.* at 1217-18 n.15 (distinguishing litigation-based waiver from the contractual-based waiver at issue in the case); *see also Suter v. Munich Reinsurance Co.*, 223 F.3d 150, 163 (3d Cir. 2000). As the Eleventh Circuit, discussing *Foster*, explained:

> [T]he cases that have applied [the "clear and unequivocal"] standard have arisen when the removing party participated in actions in the state court prior to removal that might be interpreted as a waiver of the right to remove. Such litigation-based waivers must be distinguished from the contractual waivers at issue in this case and in *Foster*. In the context of litigation-based waivers, the clear and unequivocal standard makes sense.

Snapper, Inc. v. Redan, 171 F.3d 1249, 1261 (11th Cir. 1999). There is, in short, no conflict between the decisions of the Third Circuit and those of other courts.

Maremont's petition is premised upon the argument that a single sentence from the Panel's summary Order granting Mrs. St. John's motion to remand on the basis of procedural defects in the Notice of Removal will be interpreted as a rejection of the Third Circuit's own precedent which holds that a litigation-based waiver of the right to remove must be "clear and unequivocal." This premise is unfounded. Like the other circuit courts, the Third Circuit adheres to the "clear and unequivocal" test.

2. Further, the District Court's waiver ruling (which is effectively the ruling of which Maremont seeks review) applied the proper test. Although the District Court did not expressly cite the "clear and unequivocal" test, the opinion adhered to this standard. Maremont maintained throughout the District Court proceedings that, based upon *Foster*, among other

cases, a waiver must be "clear and unequivocal." Mrs. St. John did not challenge the standard or argue that a different one applied. Rather, she called the court's attention to cases finding a clear and unequivocal waiver where a defendant, following the accrual of a right to remove, takes some substantial affirmative action in state court, indicating a willingness to litigate in the state forum. That is, she argued that the waiver had been "clear and unequivocal."

The District Court's written decision granting Maremont's motion to stay reflects this standard and relies on cases that apply it. Pet. App. 6a-7a (citing *Estate of Krasnow v. Texaco, Inc.*, 773 F. Supp. 806 (E.D. Va. 1991); *JP Morgan Chase Bank, N.A. v. Smith*, 2008 WL 2943369 (D. N. J.)). For example, in *Estate of Krasnow*, the court stated that a "waiver must be clear and unequivocal," 773 F. Supp. at 808, and concluded that, by awaiting the state court's decision on a demurrer before removing, the defendant demonstrated a clear and unequivocal intent to waive its right to remove. *Id.* at 809. The District Court below also cited *Wright and Miller, Federal Practice and Procedure* § 3721 (3d ed.2008), for the point that "a state court defendant may lose or waive the right to remove the case to a federal court by taking some substantial offensive or defensive action in the state court action indicating a willingness to litigate in that tribunal before filing a notice of removal with the federal court." Pet. App. 7a.

Maremont parts company, not with the legal standard applied by the District Court, but with its

application of the facts of this case to that standard. That application, however, manifests no conflict among the appellate courts. Moreover, "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Sup. Ct. R. 10.

B. The Court of Appeals Did Not Decide an Important Question of Federal Law

Maremont also argues that the Third Circuit's Order "decide[s] an important question of federal law that has not been, but should be, settled by this Court." *See* Sup. Ct. R. 10(c). Again, this argument is based on Maremont's failure to recognize that the Third Circuit remanded because Maremont filed a procedurally defective Notice of Removal, which it did not cure within 30 days after the case became removable. The Third Circuit did not hold that Maremont waived its statutory right to remove by participating in jury selection because that issue had not yet been briefed. That being said, even if the Third Circuit's remand order had been based on Maremont's waiver of its removal right, the concerns raised by Maremont are overstated and do not raise any important question of federal law.

1. Maremont states that "this Court historically has taken a particular interest in ensuring that the standards for removal to federal courts are applied evenly across the country." Pet. 18. Yet the cases Maremont cites are irrelevant to that proposition,

instead addressing jurisdictional issues. Most of the cases cited by Maremont concern appellate jurisdiction to review a remand order. See *Carlsbad Tech., Inc.*, *supra*, __ U.S. __ , 129 S. Ct. 1862; *Powertex Corp.*, *supra*, 551 U.S. 224 (2007); *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706 (1996); *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124 (1995). One case questioned whether federal jurisdiction was destroyed where a claim is barred by the Eleventh Amendment, *Wis. Dep't of Corr. v. Schacht*, 524 U.S. 381 (1998), and another commented on the need to establish a consistent practice in dealing with questions of subject matter jurisdiction, holding that the party alleging federal subject matter jurisdiction has the burden to demonstrate its existence. *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178 (1936). The only case which considers the right to remove is *Murphy Bros. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344 (1999). There, the Court established a bright-line rule to resolve the conflicts among the Circuits over when, following initiation of a removable state court action, the 30-day time period to remove begins to run. See *id.* at 347.

In any event, because the standard applicable here is undisputed - by the parties or the lower courts - the petition does not implicate the Court's interest in removal standards.

2. Maremont also contends that the standard applied by the district court was inconsistent with Maremont's "absolute" federal right to remove and that "[a] federal right of this importance cannot be waived" by participating in state court jury selection. Pet. 14.

This contention is contrary to the principles of strict construction afforded to removal statutes and at odds with established case law. Indeed, this contention cannot be reconciled with the "clear and unequivocal" test that Maremont itself advocates, which recognizes that the right to remove may be waived.

"Statutes conferring jurisdiction upon the federal courts, and particularly removal statutes, are to be narrowly construed . . . ." *Pritchett v. Office Depot, Inc.*, 420 F.3d 1090, 1094-95 (10th Cir.2005) (citing *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108-09 (1941)). Because the right to remove is statutory in origin, it "must be invoked in strict conformity with statutory requirements." *Lupo v. Human Affairs Intern, Inc.*, 28 F.3d. 269, 274 (2d. Cir. 1994). "Removal is a statutory right, and the procedures must be followed." *Lewis v. Rego Comp.*, 757 F.2d 66, 68 (3rd Cir. 1985). It is beyond question that the right to remove a case under 28 U.S.C. § 1441(b) can be waived. *Regis Associates v. Rank Hotels (Management) Ltd.*, 894 F.2d 193, 195 (6th Cir. 1990).

C. The District Court's Ruling Will Not Spur Fraudulent Joinders.

Without explaining how the district court's waiver ruling could trigger such a result, Maremont predicts an escalation of fraudulent joinders if the circumstances here are held to result in waiver. Pet. 20-21. This flawed argument is rooted in the notion that, had Maremont disclosed its intention to remove prior to participating in jury selection, the Plaintiff would have quickly joined

another non-diverse defendant before the removal papers were filed. *See* Pet. 16 (discussing *Tedford v. Warner-Lambert Co.*, 327 F.3d 423, 429 (5th Cir. 2003)).

First, the suggestion assumes that counsel would be indifferent to its Rule 11 obligations and fraudulently join an inappropriate defendant. Second, a plaintiff who has finally been able to bring a case to trial will be exceedingly reluctant to add a new party, which would reopen discovery and cause delay. Third, a plaintiff would require leave of the trial court to add a new party so late in the case, and it is inconceivable that the court would allow a new party to be added in the course of trial under the circumstances posited by Maremont.

Finally, courts are sensitive to the danger of fraudulent joinders. By way of example, the Fifth Circuit in *Tedford*, *supra*, developed a remedy to deal with a fraudulent joinder that occurred at the outset of the litigation. There, shortly after filing the complaint and well-before trial, a plaintiff attempted to defeat removal based on diversity jurisdiction by naming a non-diverse defendant in the action, after the diverse defendant notified the plaintiff of its intention to remove. *Id.* at 428. The plaintiff then post-dated a Notice of Nonsuit for the benefit of the non-diverse defendant but did not file it with the court or notify the diverse defendant until the one-year period in which a defendant may remove based upon diversity had passed. *Id.* The court did not countenance this conduct. Rather, it rejected the plaintiff's efforts to prevent removal and vindicated the defendant's right to remove

by extending the one-year time period to remove:

> Where a plaintiff has attempted to manipulate the statutory rules for determining federal removal jurisdiction, thereby preventing the defendant from exercising its rights, equity may require that the one-year limit in § 1446(b) be extended. The facts of this case present just such a circumstance.

Id. at 428-29.

It is, in sum, exceedingly unlikely that an attorney would or could fraudulently join a party in the short hiatus between the time a party informs a court of its decision to remove and perfects that removal.

IV. MAREMONT WAIVED ITS RIGHT TO REMOVE BY PARTICIPATING IN JURY SELECTION WHILE REMAINING SILENT ABOUT ITS PLAN TO REMOVE

Our courts strive to prevent defendants from gaining an unfair advantage by "testing the waters" in state court before removing to federal court. In this case, the District Court not only followed the proper legal standard–"clear and unequivocal"–it correctly applied that standard to the facts, thus finding that Maremont waived its right to remove during the state court trial.

"[T]he spirit of the removal acts . . . do not contemplate that a party may experiment on his case in

the state court, and, upon an adverse decision, then transfer it to the federal court." *Rosenthal v. Coates*, 148 U.S. 142, 147 (1893). The Third Circuit has similarly observed that the privilege of removal is susceptible to abuse by defendants "'testing the waters' in state court prior to removing to the federal district court." *Com. of Pa. v. Newcomer*, 618 F.2d 246, 252 (3d Cir. 1980).

Maremont and the other defendants filed their Notice of Removal to federal court when, after exercising most of their peremptory challenges, they became dissatisfied with the emerging jury. The District Court recognized removal at this point was inappropriate, explaining:

> It was incumbent upon Defendants to notify the state court and ask for a brief adjournment as soon as they began contemplating removal. Even if their request had been denied, merely asking would have preserved the right. But Defendants did not ask . . . . Maremont did not tell the state court of its plans until six hours later, after it filed for removal. During those six intervening hours, Defendants simultaneous[ly] prepared their removal documents and continued with jury selection. This course of action enabled Defendants to evaluate the potential jury pool and then decide whether or not to remove.

Pet. App. 7a.

The cases relied on by the district court support this ruling. *See also, e.g., Mancari v. AC & S*, 683 F.Supp. 91, 94 (D. Del. 1988) (quoting *1A Moore's Federal Practice* ¶ *0.157[9]*) ("Where the action becomes removable shortly before, at, or during the trial, the defendant may remove the case, but he must take prompt steps to do so, if his right is to be preserved; and, unless he does so, proceeding to or continuing with the trial constitutes a waiver of the right of removal, even though the thirty day period may not have elapsed."); *Waller v. American Tel and Tel*, 684 F. Supp. 475 (S.D. Tex. 1988); *Chicago Title & Trust Co. v. Whitney Stores, Inc.*, 583 F.Supp. 575 (N.D. Ill. 1984); *Waldron v. Skelly Oil Co.*, 101 F. Supp. 425, 426 (E.D. Mo.1951) ("[W]hen a case becomes removable during the process of a trial, the right to remove may be waived by proceeding with the trial without objection, but if timely objection is made the record is preserved and what happened thereafter does not prevent removal.").

Conversely, the cases relied on by Maremont are distinguishable. For instance, in *Grubb v. Donegal Mut. Ins. Co.*, 935 F.2d 57 (4th Cir. 1991), the Fourth Circuit first observed that a waiver determination involves a factual and objective inquiry, which would warrant reversal only if the lower court ruling was clearly erroneous. *Id.* at 59. In reviewing the district court's denial of the remand motion, the Fourth Circuit noted that although the removing defendant continued to seek summary judgment immediately following dismissal of the last non-diverse defendants during the motion proceeding, the removing attorney did not go to

the hearing with any knowledge that the non-diverse defendants might be dismissed. *Id.* The court also pointed out that the defendant did not take any substantial affirmative steps in the state court after the case became removable and had already filed its summary judgment motion before the case was removable. *Id.*

Importantly, the Court also recognized that the plaintiff seeking remand

> point[ed] to several factors that might have supported a contrary finding of fact as to [the defendant's] intent in participating as it did in the state court proceeding. *Had the court found differently, we likely would have been compelled to affirm that finding as not clearly erroneous; but that was not its finding, and the one made was, as indicated, a plausible one that we may not reject.*

Id. at 59-60 (emphasis added).

Rothner v. City of Chicago, 879 F.2d 1402 (7th Cir. 1989), cited by Maremont, is also distinguishable. There, the court found that the city-defendant did not waive its right to remove by opposing the plaintiff's motion for a temporary restraining order to prevent the city from enforcing an allegedly unconstitutional ordinance. *Id.* at 1418-19. Shortly after commencing the case, plaintiff filed an application for a temporary restraining order, which was argued and decided on the same day. The court of appeals held that the "district

court's decision was, by the court's own admission, against the long-settled rule that opposing a motion for a temporary restraining order in state court does not waive the right to remove." *Id.* The court also criticized the district judge's ruling as a "'poorly disguised' vehicle to effect a discretionary remand" where such was contrary to case law. *Id.* at 1408.

Maremont's reliance on *Akin v. Ashland Chemical Co.*, 156 F.3d 1030, 1036 (10th Cir. 1998), is likewise misplaced. There, the plaintiffs argued that removal was improper because one defendant "was barred from consenting to removal because it had previously filed a motion for summary judgment in state court[.]" *Id.* However, since the case was not clearly removable when the motion was filed, the court ruled that, absent adequate notice of the right to remove, a defendant is not barred from the right of removal just because it defends itself in the state court forum. *Id.* Notably, the defendant's summary judgment motion had not yet been decided when the case was removed. *Id.*

Most importantly, in the cases Maremont cites, the alleged waivers all occurred well *before* trial commenced, not *during* the trial. Here, once Maremont learned that the case was removable, they actively participated in jury selection without advising the trial court that it was preparing a Notice of Removal. Thus, Petitioner and the other Defendants were able to evaluate the composition of the jury before making a final decision on removal. "Testing the waters" of the jury pool before removing is precisely the kind of state court "experiment[ation]" this Court denounced in

Rosenthal, *supra*, 148 U.S. at 147, more than a century ago.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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